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No. 90-664

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1990

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QUALITY INNS INTERNATIONAL, INC., *et al.*,  
*Petitioners*

v.

L.B.H. ASSOCIATES LIMITED PARTNERSHIP and  
FEDERAL DEPOSIT INSURANCE CORPORATION,  
*Respondents*

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On Petition for Writ of Certiorari to the  
United States Court of Appeals  
for the Fourth Circuit

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**PETITIONERS' REPLY TO THE BRIEF FOR THE  
FEDERAL RESPONDENT IN OPPOSITION**

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**ARGUMENT**

In its Brief in Opposition, the Federal Respondent raises three points. First, an attempt is made to show that the present case does in fact satisfy the alleged "money or money's worth" exception to the Absolute Priority Rule. Second, the Federal Respondent claims that the issues raised by the Petition do not warrant review on a Writ of Certiorari. Third, an argument is advanced that a remand of this matter would be imprac-

tical at the present time. None of these contentions has the slightest validity, and none of them warrants more than a brief discussion.

Clearly, the Federal Respondent's consideration of the alleged "money or money's worth" exception is fatally flawed by its misdescription of the relative seniority of the claims in question. According to the Brief in Opposition, the claims of the Debtor's principals were "high priority debt", "senior to petitioners' claims", and "higher-priority secured debt". *See Brief in Opposition, at 6-7.*

In advancing this argument, the Federal Respondent simply ignores the fact that the partnership interests of the Debtor's principals (which were retained under the Plan) are concededly junior to the Petitioners' claims. This fact was recognized by the District Court, which stated as follows:

I would note that the class 7 claims are secured claims by definition. These general partnership interests are junior to the Quality unsecured claims which, under the plan, are not being paid in full.  
[Appendix, at 33a]

Indeed, the Court of Appeals also acknowledged the junior status of the interests of the Debtor's principals.  
[Appendix, at 9a]

Inexplicably, as outlined in the Petition for Writ of Certiorari, the courts below failed to apply the Absolute Priority Rule and allowed the principals' junior interests to survive despite the obvious impairment of Petitioners' senior claims. Instead of supporting the lower courts' erroneous legal conclusions, the Brief in Opposition compounds the error by misrepresenting the priorities of the parties' claims. Such confusion of the record is of little service to the Court in resolving this important issue. In reality, the errors in the Brief in Opposition merely

serve to underscore the unusual nature of the holdings below, which impaired senior claims in order to preserve junior claims, in clear violation of the Absolute Priority Rule.

Second, the Federal Respondents' contentions as to the desirability of reviewing these issues simply do not pass muster. The Brief in Opposition admits that, in *Norwest Bank Worthington v. Ahlers*, 485 U.S. 197 (1988), the Federal Respondent took the opposite view and urged this Court to apply the Absolute Priority Rule strictly and without exceptions. *See Brief in Opposition*, at 7. The Federal Respondent also recognizes that the Court of Appeals in this case improperly applied the Absolute Priority Rule. *Id.* at 9. Moreover, the Federal Respondent presents further clear evidence of the conflicts among the Circuits on the strictness with which the Absolute Priority Rule should be applied. *Compare Kham & Nate's Shoes No. 2, Inc. v. First Bank of Whiting*, 908 F.2d 1352 (7th Cir. 1990) (no exceptions to Absolute Priority Rule) with *In re Blankemeyer*, 861 F.2d 192 (8th Cir. 1988) (recognizing exceptions), both cited in Brief in Opposition, at 9.

Accordingly, this case concededly displays the factors which this Court regards as significant in granting review. These include the importance of the issue, conflicting decisions in the lower courts, and an erroneous decision by the Court of Appeals in this case justifying the exercise of the Supreme Court's power of supervision. *Compare Rule 10, Rules of the Supreme Court of the United States*. Therefore, in addition to the factors discussed at length in the Petition for Writ of Certiorari, one need look no further than the Brief in Opposition itself to justify issuance of a Writ of Certiorari.<sup>1</sup>

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<sup>1</sup> Only a footnote reference is needed for the contention that Petitioners waived their arguments below. The opinions of the lower courts (App. 8a & 33a) are clear evidence to the contrary.

Finally, the Federal Respondent suggests that, as a practical matter, it is too late to "unravel" the Plan in this case. *See Brief in Opposition*, at 9. No reason is given for this highly generalized assertion. There is no evidence, for instance, that the Debtor's wealthy principals would be unable to provide an actual infusion of cash, if they were required to do so. In any event, the Federal Respondent provides no basis for a finding that the Debtor's plan would "unravel" if the principals were to observe the Absolute Priority Rule as required by law.

### CONCLUSION

This Petition raises serious issues which have already divided the lower courts and which will continue to arise in today's economic climate as the principals of failed business enterprises attempt to retain control of those enterprises. This Court should provide a clear directive as to the conditions under which such principals will be allowed to retain their power. In particular, this Court should strictly construe the Absolute Priority Rule and determine that, if any exception is to be allowed at all, only the infusion of new capital will justify the principals' continued control. The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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